IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARLOS SANTIAGO, Petitioner,	:	
v.	:	CIVIL ACTION
GILBERT A. WALTERS, Superintendent, State Regional Correctional Facility - Mercer, CAROLYN DARINGER, Assistant District Attorney, Berks County, and D. MICHAEL FISHER, Attorney General of the Commonwealth of Pennsylvania Respondents.	:	NO. 01-1940

Memorandum and Order

YOHN, J. December ___, 2001

Presently before the court is a pro se petition for a writ of habeas corpus filed by petitioner Carlos Santiago pursuant to 28 U.S.C. § 2254. For the reasons that follow, the petition will be denied.

Procedural History and Background

From 1985 to 1992, petitioner engaged in a pattern of sexual conduct with his girlfriend's daughter, who during the course of their relationship was a minor. On February 25, 1994, he was charged with two counts of rape, one count of statutory rape, two counts of indecent assault, one count of indecent exposure, one count of endangering the welfare of a child, and one count of corruption of a minor. On July 6, 1994, petitioner entered into a plea agreement pursuant to which he pled guilty to the statutory rape, endangering the welfare of a child, and

corruption of a minor charges[1] only insofar as they pertained to his actions during the year 1990.[2] He was sentenced to a prison term of 2 to 9 years for statutory rape, and to sentences of 2 to 5 years on the latter two charges which were to be served concurrently with each other and consecutively with the former sentence. *See* Appendix to Respondents' Answer to Petition for Writ of Habeas Corpus ("App.") at A6-A16. In sum, then, Santiago was sentenced to a term of 4 to 14 years for all charges to which he pled guilty pursuant to his agreement with the Commonwealth.

Although he never directly appealed his conviction or sentence, on January 11, 1999, petitioner filed a motion for post-conviction collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541, et. seq. He alleged the following bases for relief:

> (1) That plea and sentencing counsel was ineffective for failing to investigate the case, to assist petitioner, and to interrogate the victim, which, if done, would have proved that the statements given by the victim and the victim's father were not truthful;
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> (2) That his guilty pleas were unlawfully induced by counsel due to this alleged ineffectiveness;
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> (3) That preliminary hearing counsel unlawfully induced him into waiving his preliminary hearing;
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> (4) That his sentence is illegal;
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> (5) That the Commonwealth violated the plea agreement because he was not paroled by the Pennsylvania Board of Probation and Parole upon

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[1] The specific statutory provisions the violation of which was admitted by petitioner were 18 Pa. Cons. Stat. §§ 3122, 4304 and 6301(a).

[2] During 1990, the victim of petitioner's sexual exploits was under the age of 15. *See* App. at 10.

> the completion of his minimum term despite his good conduct while in prison;
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> (6) That exculpatory evidence that was unavailable at the time of trial and that, if introduced, would have affected the outcome of the trial subsequently has became available;[3] and
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> (7) That a violation of the constitution or laws of Pennsylvania or of the constitution of the United States so undermined the truth-determining process in this case that no reliable adjudication of guilt or innocence could have transpired.

Commonwealth v. Santiago, No. 340/94 (Berks Cty. Ct. Com. Pls. Apr. 27, 1999) at 2, *reproduced in* App. at A75.

Subsequent to the filing of this petition, the PCRA court appointed Gail Chiodo, Esq. to serve as post-conviction counsel for petitioner. *See* App. at A55. However, upon reviewing the record and the petition filed by Santiago, Chiodo submitted a petition pursuant to *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. Ct. 1988), for leave to withdraw as counsel. In this filing Chiodo asserted the lack of any meritorious basis upon which relief could be granted by the PCRA court. Specifically, she noted that the 1995 amendments to the PCRA require that petitions for post-conviction relief be filed within 1 year of the date on which the conviction becomes final. Chiodo further recognized that Pennsylvania courts are required to dismiss untimely petitions unless (1) the untimeliness is a product of illegal governmental interference with the petitioner's diligent efforts to present the claim; (2) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or (3) the right asserted is a constitutional right that was recognized by the

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[3] Petitioner advanced no allegations in support of this claim in the memorandum of law that accompanied his petition. Moreover, it is unclear how he possibly could do so, given that he pled guilty and never went to trial.

Supreme Court of the United States or the Supreme Court of Pennsylvania after the expiration of the limitations period and is retroactively applicable. *See* App. at A61; 42 Pa. Cons. Stat. § 9545(b)(1).

In cases like petitioner's, where the conviction became final prior to the PCRA amendments' effective date of January 16, 1996,[4] the amended PCRA provided a one year grace period (i.e. until January 16, 1997) during which a first petition for post-conviction relief could be filed. *Commonwealth v. Tedford*, 781 A.2d 1167, 1171 (Pa. 2001). Having been filed on January 11, 1999, however, Santiago's petition was untimely by nearly two years even taking into account this grace period. Moreover, Chiodo asserted (and petitioner made no contrary allegation) that none of the exceptions delineated in 42 Pa. Cons. Stat. § 9545(b)(1) applied to petitioner's case. *See* App. at A64-73. Accordingly, she concluded that the dismissal of Santiago's petition was mandated, and that he consequently was ineligible for relief under the PCRA. *See* App. at A62.

The PCRA court agreed, and adopted the untimeliness rationale in denying petitioner's claim. *See Commonwealth v. Santiago*, No. 340/94 (Berks Cty. Ct. Com. Pls. Apr. 27, 1999) at 4, *reproduced in* App. at A77. It then went on to briefly consider the merits of the petition, and concluded that petitioner's substantive claims did not warrant relief. *See id.* at 5, *reproduced in* App. at A78. Accordingly, it granted Chiodo's petition to withdraw as counsel for Santiago, and notified petitioner of its intent to dismiss the petition within 20 days. Petitioner

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[4] Because petitioner pled guilty on July 6, 1994, his conviction became final on August 5, 1994. *See Commonwealth v. Brown*, 767 A.2d 576, 579 (Pa. Super. Ct. 2001) (noting that when a direct appeal is not taken, a criminal conviction becomes final 30 days after the imposition of his sentence) (citation omitted).

responded to this notification by requesting an extension of this 20 day period, and the PCRA court granted this request in an order dated May 25, 1999. Petitioner failed to contest the constitutionality of the PCRA's limitations period, as he had asserted he would do in his response to the court's 20 day notification, and the court accordingly dismissed his PCRA petition on July 7, 1999.

On July 1, 1999, while his first PCRA petition remained pending, Santiago filed a second pro se PCRA petition. In this action petitioner again asserted that he had been deprived of effective assistance of counsel, that his guilty plea had been unlawfully induced, and that his sentence exceeded the lawful maximum. He also asserted for the first time that his sentence violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, and that the sentencing court lacked personal jurisdiction over him. *See* App. at A85-87. Again Chiodo was appointed as petitioner's counsel, and again she filed a *Finley* petition to withdraw from the representation. *See id.* at A96. She noted that like its predecessor, this petition also was untimely under the PCRA. *See id.* at A101. She further asserted that none of the exceptions outlined in 42 Pa. Cons. Stat. § 9545(b)(1) applied to Santiago's petition.

Upon considering this second *Finley* petition, the PCRA court again found that Santiago's petition was untimely. *See Commonwealth v. Santiago*, No. 340/94 (Berks Cty. Ct. Com. Pls. Oct. 13, 1999) at 3, *reproduced in* App. at A113. The court permitted Chiodo to withdraw, and again gave notice of its intent to dismiss the petition after 20 days. This time petitioner failed to respond at all to the court's notice,[5] and his second PCRA petition was

[5] The state court docket reflects that on November 3, 1999 Santiago filed a pro se appeal to the Superior Court from the PCRA court's October 13, 1999 notice, but this appeal was

dismissed on November 9, 1999.

Since that time, petitioner has attempted to institute various actions in the Pennsylvania courts. For example, in March, 2000, Santiago filed a complaint sounding in breach of contract in the Court of Common Pleas of Berks County. He alleged that the Pennsylvania Board of Probation and Parole ("PBP&P" or "Board") had breached the plea agreement "contract" by relying on false information (i.e. erroneous indications in petitioner's criminal history that he had been convicted of sex offenses committed in 1985) to deny him parole after the expiration of his minimum sentence.[6] This complaint proved fruitless. During

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denied as incomplete by the Superior Court on February 25, 2000.

[6] The PBP&P has denied petitioner parole on four separate occasions. The first denial occurred on June 8, 1998, and the Board cited as bases for the decision Santiago's assaultive offense and behavior potential, his need for treatment in a sex offender program, and his projection of blame onto his child victim. *See* Answer at Exhibit 4. The second denial was issued on January 15, 1999, and this decision indicated that the PBP&P believed that its mission "to protect the safety of the public and to assist in the fair administration of justice [could] not be achieved through [his] release on parole." *Id.* at Exhibit 5. It also cited petitioner's failure to successfully complete a treatment program for sex offenders, his failure to receive a favorable recommendation from the department of corrections, his continued refusal to accept responsibility for his actions and his continued projection of blame onto the victim. *See id.* On January 14, 2000, the PBP&P next denied Santiago parole, citing essentially the same reasons as it had in the January 15, 1999 denial. *See id.* at Exhibit 6. Finally, on February 1, 2001, the PBP&P issued its most recent denial of parole to petitioner. In this decision it indicated the need for petitioner to successfully complete a treatment program for sex offenders, to obtain a favorable recommendation from the Pennsylvania Department of Corrections, and to maintain a clear conduct record. *See id.* at Exhibit 7. This was the only parole denial that did not cite as a decisional basis petitioner's continued attribution of blame to the child victim of his exploits.

During the period during which the first two parole denials were issued by the PBP&P, petitioner's file erroneously contained a record of convictions for sex offenses committed in 1985. Santiago noticed this error, and petitioned the PCRA court to correct this incorrect information. This petition was granted by an order of that court dated December 21, 1999. However, as of April, 2001 the Pennsylvania State Police repository records still erroneously indicated that he had been convicted of, or pled guilty to, the 1985 offenses. On April 20, 2001 he successfully challenged those records, which were amended to reflect only his 1990 convictions.

that same month, petitioner filed a request for leave to file original process and a petition for a writ of mandamus in the Supreme Court of Pennsylvania. In this petition he again alleged that his parole denial unconstitutionally was predicated on the PBP&P's consideration of this erroneous criminal history. *See* Attorney General's Answer to Petition for Writ of Habeas Corpus ("Answer") ¶ 6. On July 7, 2000, the Supreme Court granted the request for leave to file original process, but denied the petition for a writ of mandamus. *See* Answer at Exhibit 10. Petitioner additionally has filed motions to modify his sentence, to withdraw his guilty plea and for a new trial, and to modify his sentence *nunc pro tunc*. These motions were denied by the PCRA court on August 11, 2000, September 6, 2000, *see* App. at A116, and March 13, 2001 respectively.

On April 11, 2001,[7] petitioner filed the instant federal habeas corpus action pursuant to 28 U.S.C. § 2254. In this petition and in various pleadings filed in support thereof, Santiago alleges the following claims for relief:[8]

> (1) his guilty plea was not knowing and intelligent because he believed that he would receive a 3 to 6 year sentence whereas he actually received a sentence of 4 to 14 years;

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[7] Although it is true that the filing date of this document is April 19, 2001, because of the unique situation of their drafters, pro se habeas petitions are deemed filed when they are delivered to prison authorities. *Houston v. Lack*, 487 U.S. 266, 270-71 (1988). Santiago's petition was signed on April 11, 2001, and accordingly the court will deem it filed on that date.

[8] Though generally intelligible, petitioner's claims are repetitive and not uniformly clear. Varying assertions are made in his original petition (Doc. #1), his Affidavit to Support Habeas Corpus Petition (Doc. #3), and his Answer in Addendum and Information (Doc. # 5). Because "wide latitude" generally is afforded to pro se petitions for habeas relief, *United States v. Garth*, 188 F.3d 99, 105 n.7 (3d Cir. 1999), the court will construe Santiago's petition as raising all of the claims referenced in these pleadings.

> (2) his conviction violates the United States Constitution[9] because the victim failed to testify against him and because the victim's father had a close relationship with the trial court and members of the District Attorney's office;
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> (3) his sentence exceeds the lawful maximum;
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> (4) forged documents that erroneously indicate that Santiago previously had been convicted of rape have surfaced;
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> (5) there is no basis for his guilty plea because Children Youth Services knew that the victim was a prostitute and never had revealed her age to Santiago;
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> (6) the Parole Board has violated his constitutional rights by impermissibly basing its previous parole determinations on his erroneous criminal history, and by failing to conduct a parole review based on his corrected criminal record.[10]

See Petition for Writ of Habeas Corpus at 9-10; Affidavit to Support Habeas Corpus Petition at 1-2.

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[9] Although petitioner does not specify the constitutional provision to which he is referring, the court will construe this claim as asserting Fourteenth Amendment Due Process and Confrontation Clause violations. I note, however, that like much of the task of interpreting petitioner's "claims," the enterprise of framing the assertions contained within Santiago's second claim in legal terms is somewhat akin to placing a square peg into a round hole. For example, on its face, his allegation regarding the victim's failure to testify seems to allege a Confrontation Clause claim. *See, e.g.*, *Shaw v. Collins*, 5 F.3d 128, 132 (5th Cir. 1993) ("The State correctly assumes that its failure to call [the child victim of defendant's sexual abuse] to testify at the trial violated Defendant['s] . . . Confrontation Clause rights."). However, petitioner never went to trial, which of course is the only forum in which his confrontation right possibly could have been exercised.

[10] I will construe this claim to allege a Fourteenth Amendment Due Process violation. *See generally Gambino v. Morris*, 134 F.3d 156, 165 (3d Cir. 1998) (holding that the PBP&P's failure to adhere to appropriate procedures in making a parole determination violated the petitioner's due process rights).

On June 14, 2001, the court referred this matter to a Magistrate Judge for a report and recommendation. The Magistrate Judge requested on June 21, 2001 answers from both the District Attorney of Berks County and the Attorney General for the Commonwealth of Pennsylvania. Both parties have complied with Magistrate Judge's request, and they collectively contend that Santiago's petition should be dismissed because he has failed to exhaust his state remedies, because his claims were procedurally defaulted in state court, and because when evaluated on their merits, his claims fail to articulate a viable basis for habeas relief.

Discussion

For a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to be justiciable, several requirements must be satisfied. One of these, as articulated in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), is that the petitioner's available state court remedies must be exhausted. *See* 28 U.S.C. § 2254(b)(1)(A) (prohibiting federal courts from considering a habeas petition unless "the applicant has exhausted the remedies available in the courts of the State"); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997) ("It is axiomatic that a federal habeas court may not grant a petition for a writ of habeas corpus filed by a person incarcerated from a judgment of a state court unless the petitioner has first exhausted the remedies available in the state courts."). The exhaustion requirement is a product of concerns sounding in comity and federalism, and it will not be deemed satisfied if the petitioner "has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). Notably, however, exhaustion is excused where there literally are no available state procedures to be exhausted (i.e. where exhaustion would be futile in a *de jure* sense), or where "circumstances exist that render such process ineffective to protect

the rights of the applicant" (i.e. where exhaustion would be futile in a *de facto* sense). 28 U.S.C. § 2254(b)(1)(B).

In this case, each of petitioner's first five claims either never was raised before the PCRA court or, if raised, never was presented to any state appellate tribunal, despite the PCRA court's explicit indication of petitioner's right to appeal within 30 days of its dismissal of his petition.[11] *See* App. at A92, A115. Consequently, these claims are unexhausted. Indeed, as

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[11] It appears that petitioner's first federal claim, alleging that his guilty plea was not knowing and intelligent, was raised in both of his PCRA petitions. In his petition for federal habeas corpus relief, Santiago states that "on first and second PCRA, petitioner claimed that the guilty plea was not not [sic.] intelligently decided by defendant," and proceeds in the same breath to set forth the basis for his first claim. While it is less than completely clear from the face of the pleadings, it thus appears that petitioner believed that he was reiterating as his first federal claim a claim that he already had advanced in state court. I consequently will construe it as such. By contrast, petitioner has not previously raised his second federal claim. The only PCRA claim that referenced the victim's father and the testimony of the victim was the first claim in the first PCRA petition, which sounded in the ineffective assistance of counsel. It did not assert a Fourteenth Amendment due process of Confrontation Clause claim, as I find are advanced in Santiago's second federal claim. Petitioner's third federal claim explicitly was raised in both PCRA petitions. As for his fourth federal claim, such does not appear to have been a component of either previous PCRA petition, although his sixth claim, which I construe to be substantively related to his fourth claim, was raised in a state court mandamus action. As for petitioner's fifth federal claim, while arguably related to his PCRA claims sounding in the unlawful inducement of his guilty plea, such has not previously been raised in the form it currently assumes.

By contrast, petitioner's sixth federal claim, sounding in the PBP&P's failure to review his petition for parole based on his corrected criminal record, was raised in a state court mandamus proceeding. As stated above, his petition for a writ of mandamus was denied by the Pennsylvania Supreme Court in an order dated July 7, 2000. *See* Answer at Exhibit 10. Although the Attorney General suggests that such may have been a product of petitioner's failure to first present this claim to the Commonwealth Court, and this is a plausible interpretation, I conclude that the state supreme court's statement that it was granting petitioner's request for leave to file original process in that court indicates a better and more probable interpretation, i.e., that the petition was entertained and denied on its merits. This conclusion is supported by the fact that the court did not indicate that its disposition of the mandamus action was entered without prejudice to petitioner's right to proceed in the Commonwealth Court, as it might have been expected to do had the basis of its decision been Santiago's failure to raise his claim in that forum. *See, e.g.*, *Commonwealth v. Pursell*, 724 A.2d 293, 300 n.4 (Pa. 1999) (dismissing a

stated by the Third Circuit in *Wenger v. Frank*:

> [T]he Supreme Court [has] held that while exhaustion does not demand that state prisoners "invoke extraordinary remedies," "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." . . . This means, the Court explained, that state prisoners must "file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State."

266 F.3d 218, 223 (3d Cir. 2001) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45, 847 (1999)).

Yet although petitioner has failed to exhaust the state court remedies available to him as to these five claims, this failure is excused pursuant to 28 U.S.C. § 2254(b)(1)(B)(i) because of the absence of available remedial procedures in the Pennsylvania courts. Given the posture of this case, the only procedural mechanism by which Santiago could pursue exhaustion is a third PCRA petition. However, just as his first two state post-conviction actions were untimely under 42 Pa. Cons. Stat. § 9545(b)(1), so would such a third petition be. Nor is it conceivable, given the PCRA court's previous holdings as to the inapplicability of the statutory exceptions to the one year limitations period delineated in 42 Pa. Cons. Sat. § 9545(b)(1)(i)-(iii),

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PCRA appeal without prejudice to petitioner's right to proceed in the court of common pleas). Notably, given that petitioner had been denied parole on January 14, 2000, such an action would still have been timely at the time of the state supreme court's decision. This claim therefore has been exhausted, thereby distinguishing it from petitioner's first five claims. *See generally Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490 (1973) (holding that where the petitioner had sought a writ of mandamus from the Kentucky Supreme Court, and that court denied his petition on its merits, such constituted the exhaustion of his state court remedies such that he could bring a federal habeas corpus petition with respect to the subject of the mandamus action). However, it appears that the Pennsylvania State Police repository records have now been corrected, and petitioner may now be able to bring a timely mandamus action in the Commonwealth Court of Pennsylvania with reference to the February 1, 2001 parole denial.

see App. at A76-77, A113, that any of these exceptions would be deemed applicable to a third PCRA petition.

Indeed, the question of whether exhaustion is excused in this case is informed significantly by the Third Circuit's recent holding in *Szuchon v. Lehman*, 2001 WL 1472680, at *16 n.14 (3d Cir. Nov. 20, 2001). In *Szuchon*, like the instant matter, the federal habeas petitioner had filed an untimely PCRA petition, which had been dismissed for noncompliance with Pennsylvania's one year statute of limitations. Accordingly, Szuchon had failed to fully present his federal constitutional claim to the state courts, and his claim consequently was unexhausted. Yet the *Szuchon* court recognized that "[t]he only means of review for [petitioner's] claim would [have been] through another PCRA petition," *id.*, which would likewise have been untimely, and thus non-justiciable. *See id.* (noting that this one year limitations period is jurisdiction in nature (citing *Commonwealth v. Banks*, 726 A.2d 374, 376 (Pa. 1999))). The court of appeals therefore concluded that, given Szuchon's failure to demonstrate the applicability of any of the exceptions delineated in 42 Pa. Cons. Stat. § 9545(b)(1)(i)-(iii), his "state remedies [were] clearly foreclosed," and "[e]xhaustion [could] be excused as futile." *Id.* This reasoning applies with equal force in petitioner's case. Accordingly, Santiago's failure to exhaust his first five claims in state court is excused.

However, the fact that exhaustion is excused in petitioner's case does not render his petition justiciable. Indeed, another condition necessarily satisfied by a federal habeas petitioner is thatthe claim may not be procedurally defaulted. *See Coleman v. Thompson*, 501 U.S. 722, 729-32 (1991) (holding that "a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an

opportunity to address those claims in the first instance," and accordingly, as a matter of comity and federalism, generally cannot proceed in federal court); *Caswell v. Ryan*, 953 F.2d 853, 857 (3d Cir. 1992). Although a petitioner who has procedurally defaulted his federal claims in state court is not precluded from asserting them in federal court per se, the showings necessarily made by such a litigant are quite stringent. In order to advance such claims he must first show "cause" for defaulting his claims, and second, he must demonstrate prejudice attributable to his inability to otherwise have the claim considered on its merits. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) ("We . . . require a prisoner to demonstrate cause for his state-court default of *any* federal claim, and prejudice therefrom, before the federal habeas court will consider the merits of that claim.") (emphasis original). Alternatively, procedurally defaulted claims may be heard on federal habeas review if the petitioner "can demonstrate a sufficient probability that [the] failure to review his federal claim will result in a fundamental miscarriage of justice." *Id.*

As applied to the instant matter, this requirement is fatal to the first five of Santiago's claims. To demonstrate why this is so, it is useful to further consider the decisions of the Third Circuit in *Szuchon* and *Wenger*. In *Szuchon*, after determining that the petitioner's failure to exhaust was excused as futile, the court of appeals quickly indicated that his federal claim was "defaulted because Szuchon failed to exhaust it despite ample opportunities to do so." 2001 WL 1472680, at *16 n.14. In other words, because he had failed to adhere to the procedural requirements for having his claim reviewed in state court, Szuchon had forfeited his right to raise that claim in a federal forum. The *Wenger* court was confronted with a precisely analogous factual scenario; the habeas petitioner in that case had failed to exhaust his state court remedies, but was at the time of the court's decision precluded from doing so by a provision of

state law. "Under these circumstances," the court explained, "the claim is procedurally defaulted, not unexhausted, and the claim may be entertained in a federal habeas petition only if there is a basis for excusing the procedural default." 266 F.3d at 223-24.

In this case, petitioner clearly failed to assert his federal claims within the limitations period established by Pennsylvania law. Furthermore, he does not even attempt to allege the satisfaction of either the cause and prejudice or miscarriage of justice standard, nor does it appear that he possibly could do so. Accordingly, as in both *Szuchon* and *Wenger*, Santiago's first five claims will be dismissed because they are procedurally defaulted.

As for Santiago's sixth claim, I already have concluded that such was exhausted in petitioner's mandamus action with reference to the January 14, 2000 denial of parole.[12] *See supra* note 11. A corresponding conclusion is that this claim was not defaulted as a matter of state law. Moreover, because the instant federal action was instituted within one year of the state supreme court's denial of petitioner's petition for a writ of mandamus, it is timely under the AEDPA's one year statute of limitations, codified at 28 U.S.C. § 2244(d).[13] Thus I will consider

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[12] The inclusion of claim 6 within this petition renders it technically a "mixed" petition, i.e. one containing both exhausted and unexhausted claims. Under ordinary circumstances mixed petitions must be dismissed without prejudice. *Rose v. Lundy*, 455 U.S. 509, 522 (1982). Where, however, exhaustion of the unexhausted claims would be futile, mixed petitions need not be dismissed on this ground. *Morris v. Horn*, 187 F.3d 333, 337-38 (3d Cir. 1999) (citing *Christy v. Horn*, 115 F.3d 201, 206-07 (3d Cir. 1997)).

[13] The state supreme court's denial of petitioner's mandamus petition transpired on July 7, 2000. As stated above, I consider this action to have been filed on April 11, 2001. Even disregarding the doctrine that a prisoner's pleadings will be deemed filed on the date they are submitted to prison officials for filing, Santiago's habeas petition actually was received by the clerk of this court on April 19, 2001. Accordingly it is timely under 28 U.S.C. § 2244(d)(1)(A).

the merits of petitioner's sixth claim.[14]

To reiterate, I have construed petitioner's sixth claim to allege a violation of the Fourteenth Amendment Due Process Clause. *See supra* note 10. Moreover–although such is not mentioned in the brief text of the Pennsylvania Supreme Court's denial of Santiago's mandamus petition–as previously noted, I will assume that the state supreme court, in denying petitioner a writ of mandamus, considered this federal constitutional claim on its merits. *See supra* note 11. The actual mandamus petition setting forth the basis of his claim is not part of the record before me. Under the AEDPA, habeas relief is available with respect to a claim that was adjudicated on the merits in state court only where "the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2). Accordingly, because petitioner's claim does not concern an allegedly unreasonable factual determination on the part of the Pennsylvania Supreme Court, the only possible basis for federal habeas relief would be if that court, in denying Santiago's mandamus petition, applied unreasonably United States Supreme Court precedent construing the Fourteenth Amendment's due process guaranty. I conclude that the state supreme court did not do so.

Preliminarily, Santiago identifies no decision of the United States Supreme Court that gives rise to his claim. This in and of itself could be considered fatal to his habeas petition.

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[14] I note that my ability to dispose of claim 6 on its merits is not contingent upon that claim having been exhausted in Santiago's mandamus action. Indeed, even if claim 6 were unexhausted, I explicitly am empowered by 28 U.S.C. § 2254(b)(2) to deny it on its merits.

Williams v. Taylor, 529 U.S. 362, 390 n.15 (2000). Even ignoring this point, however, the PBP&P enjoys what has been characterized as "broad discretion" in making parole determinations. *Cohen v. Horn*, 1998 WL 834101, at *4 (E.D. Pa. Dec. 2, 1998) (citing *Krantz v. PBP&P*, 483 A.2d 1044, 1047 (Pa. Commw. Ct. 1984)). Nonetheless, the PBP&P is not wholly unconstrained by constitutional requirements. For example, it is constitutionally impermissible to deny parole to an inmate because of his or her race, religion or sex. *See, e.g.*, *Block v. Potter*, 631 F.2d 233, 236 (3d Cir. 1980) ("Although *Greenholtz* [*v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979)] indicates that a state may . . . deny it completely, a state statute may not sanction totally arbitrary parole decisions founded on impermissible criteria."). Nor can the Board deny parole to an inmate in retaliation for his having filed a lawsuit against the individual members of the Board. *See Burkett v. Love*, 89 F.3d 135, 140 (3d Cir. 1996). Aside from such impermissible grounds for denial, however, a parole determination may not be disturbed unless the Board lacked a rational basis for its decision. *See Williams v. Meyers*, 2000 WL 1714941, at *3 (M.D. Pa. Nov. 15, 2000) (applying the rational basis standard in the context of a § 2254 petition for habeas relief based on a parole denial).

In this case, the PBP&P articulated numerous reasons for its January 14, 2000 denial of parole[15] to Santiago, none of which had anything to do with the erroneous notation regarding his 1985 convictions. These included his failure to successfully complete a treatment program for sex offenders, his failure to obtain a favorable recommendation from the Pennsylvania Department of Corrections, and his continued placement of blame on his child

[15] It presumably is this denial to which the mandamus petition referred, as it was the most recent denial at the time of the March, 2000 filing of the mandamus action.

victim. *See* Answer at Exhibit 6; *supra* note 6. Accordingly, I conclude that the PBP&P had a rational basis for denying petitioner parole, and accordingly this decision comported with the requirements of due process. *See, e.g.*, *Williams*, 2000 WL 1714941, at *3.

Moreover, insofar as petitioner's sixth claim alleges a due process violation stemming from the PBP&P's failure to review his application for parole based on his corrected criminal history, this contention is equally unpersuasive. Preliminarily, as a factual matter, the PBP&P has not by any means categorically refused to consider petitioner's corrected criminal history; it simply will not do so until petitioner's next scheduled parole review, in or after January, 2003. *See* Answer at Exhibit 7. Moreover, in legal terms, this claim is distinguishable from petitioner's contention regarding the improper denial of parole because it necessarily is predicated not on a constitutional right to be free from a parole determination based on forbidden grounds, but rather on a right to a parole hearing in the first place. It is to this issue that the United States Supreme Court spoke in *Greenholtz*, and the import of that holding is that there is no constitutionally cognizable liberty interest in parole. *See* 442 U.S. at 7. Nor is there any requirement that a state establish a parole system at all. *See id.* Accordingly, petitioner certainly has suffered no due process deprivation based on the PBP&P's failure to immediately conduct a parole review based on Santiago's corrected criminal record.

The Pennsylvania Supreme Court consequently did not engage in an unreasonable application of federal law in rejecting petitioner's due process claim, and the AEDPA's standard for habeas relief therefore is unmet in this case.

Conclusion

For the foregoing reasons, Santiago's petition will be denied. His first five claims

are non-justiciable because they were procedurally defaulted under Pennsylvania law, and his sixth claim fails because it is non-meritorious.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARLOS SANTIAGO, Petitioner,	:	
v.	:	CIVIL ACTION
GILBERT A. WALTERS, Superintendent, State Regional Correctional Facility - Mercer, CAROLYN DARINGER, Assistant District Attorney, Berks County, and D. MICHAEL FISHER, Attorney General of the Commonwealth of Pennsylvania Respondents.	:	NO. 01-1940

Order

And now, this ___ day of December, 2001, upon consideration of the petition for habeas corpus (Doc. # 1), petitioner's affidavit to support habeas corpus petition (Doc. #3), petitioner's answer in addendum and information (Doc. # 4), respondent Fisher's answer to petition for writ of habeas corpus (Doc. # 12), respondent Baldwin's answer to the motion for writ of habeas corpus (Doc. #13), the appendix thereto, petitioner's reply thereto (Doc. # 14), the report and recommendation of the Magistrate Judge and petitioner's objections thereto (Doc. #17), it is hereby ORDERED that the petition is DENIED.

No certificate of appealability will be granted to petitioner, as he has failed to make a substantial showing of the denial of a constitutional right.

_____

William H. Yohn, Jr., Judge